IN THE HIGH COURT OF SOUTH AFRICA /MF

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

20131118

28/3/18

Case No: 21994/2013

In the matter between:

XSTRATA SOUTH AFRICA (PTY) LIMITED Plaintiff

and

BRIGHT IDEA PROJECTS 411 CC
t/a MK METALS Defendant

JUDGMENT

PRINSLOO, J

[1] The parties entered into two so-called "supply agreements" in terms of which the Defendant would be entitled to remove scrap metal and, later, scrap

copper cables from some of the Plaintiff's collieries, mainly in the Witbank / Ogies area.

The Defendant would pay the Plaintiff for the scrap metal at a rate calculated in terms of formulas contained in the supply agreement.

When the Plaintiff instituted action against the Defendant for monies allegedly due by the Defendant to the Plaintiff in respect of scrap metal and scrap copper cables removed from the Plaintiff's sites, the Defendant denied liability, and instituted three counterclaims. One of the counterclaims is based on an argument that the Plaintiff was also obliged, in terms of the agreements, to pay the Defendant for removing the scrap metal and scrap copper, and the other two counterclaims are for damages based on allegations that, when the Plaintiff demolished infrastructure on two of its collieries, it engaged the services of another contractor to conduct the demolition work, but also allowed the contractor to remove the scrap metal generated by the demolition work whereas, according to the Defendant, it was exclusively entitled to the benefit of removing the aforesaid scrap metal, from which operations substantial profits would have been generated, which profits were lost as a result of the breach of contract on the part of the Plaintiff, which allowed another contractor to lay claim to the scrap metal.

[2] The Plaintiff's claim is for a relatively modest amount of some R450,000.00,

whereas the counterclaims run into many millions of Rand.

[3] The pleadings comprised some 136 pages and the record, including notices and affidavits, came to some 2000 pages.

[4] The trial was conducted in three sessions during three calendar years, namely in June 2015, May 2016 and September 2017. In total, the trial ran for close on four weeks.

[5] Before me, Mr. Maritz, SC, appeared for the Plaintiff and Mr. Omar for the Defendant.

[6] I consider it convenient to deal with the Plaintiff's claim followed by the three counterclaims separately.

THE PLAINTIFF'S CLAIM:

[7] As I have indicated, the Plaintiff's claim is for a relatively modest amount which comes to R465,526.85, together with interest and costs.

[8] For the sake of brevity and good order it should be mentioned at the outset that during the course of the trial, and as a result of concessions made in cross-examination of the Defendant's witness, and certain agreements reached

between the parties, the somewhat unusual state of affairs emerged that the correctness of the amount claimed was admitted and the only "defence" raised was that the payment was not yet "due" because invoices rendered over a period of time by the Plaintiff to the Defendant did not comply, essentially because of the format thereof, with the provisions of the agreements entered into between the parties.

Essentially, what the "defence" amounts to, is that, although the amount fairly represents the value of the scrap metal bought and sold, the Defendant was not legally obliged to make any payment because the invoices, admittedly received by the Defendant, were flawed in that they did not comply with the format prescribed in terms of the agreement.

[9] This "defence" was never raised by the Defendant over a period of many months during which the metal and copper were bought and sold and invoices rendered. It only emerged when the Defendant sought legal advice and a plea was prepared by the Defendant's attorney.

[10] I turn, firstly, to a brief summary of what ultimately turned out to be common cause between the parties:

- The Plaintiff's Financial Manager, Group Services, Mr. Martin Henry Pearson, testified as follows:

- That he prepared a statement of account with reference to all invoices relevant to the matter, reflecting a debit for every invoice, and a credit in respect of all payments received from the Defendant, in order to achieve a running total and final outstanding balance owed. This was handed up as Exhibit "Y3";

- Pearson explained the procedure for the issuing of invoices, and established that the invoices issued in this case by the Plaintiff to the Defendant complied with the provisions of the Value-Added Tax Act, Act 89 of 1991;

- Pearson testified that Ms. Marinda de Wet, who also testified, and who was a data capturer in the employ of the Plaintiff at the relevant time, was authorised to issue VAT invoices;

- Pearson testified that each of the invoices listed in Exhibit "Y3" was a valid VAT invoice, but each invoice was issued with an original and a copy and that the original was for the customer and the copy for the Plaintiff's records. During Pearson's testimony, the Defendant's attorney placed on record that he did not dispute or challenge Pearson's evidence and it could be taken as relating to each and every invoice reflected in Exhibit "Y3";

- Pearson testified that each of the invoices as listed in "Y3" was issued by the person (as I mentioned) who was authorised to issue the invoice, that the invoice was issued to the Defendant in respect of scrap steel or scrap copper cable and that each of the invoices is numbered and bears the VAT number for the Plaintiff and a VAT number for the Defendant (and this establishes that the invoices were valid, and the invoices complied with the requirements of the aforesaid Value-Added Tax Act);

- Pearson testified that not one of the original invoices was signed by any person acting on behalf of the Plaintiff, that it has never been part of the Plaintiff's procedure in issuing invoices that the original invoices are signed and that he has never in his working career in an accounting capacity encountered a procedure where original invoices are signed. I mention this detail because it has a bearing on the "defence" relating to the format of the invoices;

- Pearson testified that all the payments made by the Defendant have been brought into account as credits in the Defendant's favour. I add that certain incorrect allegations made in paragraph 9 of the Particulars of Claim as to the amounts actually paid by the Defendant, were rectified in "Y3";

- ❖ Pearson could not say whether or not the originals of the invoices had been delivered to the Defendant;

- ❖ During Pearson's evidence it was put on record as being common cause that whatever Pearson had testified in regard to one invoice applied to each and every one of the invoices listed in "Y3";

- ❖ As I have mentioned earlier, in cross-examination of Pearson, the Defendant's counsel did not dispute that the Defendant was indebted to the Plaintiff in the mentioned amount of R465,526.85, but contended that the amount is not yet due and payable because the invoices were not drawn up and issued in accordance with the contract;

- The testimony of Ms. Marina de Wet can be summarised as follows:

  - ➢ In the period 2009 to 2011 she was in the Plaintiff's employ and responsible for the issue of invoices;

  - ➢ In drawing up the invoices, she obtained the tonnage of scrap metal from the weighbills and then calculated the amount according to the formula in the contract. (As a matter

interest I mention that instead of "weigh" the word "way" appears from time to time in the documentation. According to the Shorter Oxford English Dictionary, 5th Edition, the use of the word "way" instead of "weigh" has become obsolete. (I use the more modern version.) The scrap metal concerned had to be weighed at the Plaintiff's weighbridges for calculation purposes;

- In respect of each invoice Ms. de Wet physically handed the original invoice, together with the reconciliation showing the calculation of the invoice amounts to Ms. Tolman. This is Ms. Thembelihle Lorraine Tolman, a member of the Defendant close corporation and the driving force behind the Defendant. I add that Ms. Tolman, when she testified, denied that she physically received the original invoices from Ms. de Wet, although she admitted, as I will point out, that she received all the invoices by e-mail;

- Under cross-examination she testified that the originals of all invoices as listed in "Y3" were given to Ms. Tolman. She stuck to her guns when confronted with Ms. Tolman's denial in this regard;

- Ms. de Wet testified that she did not give the invoices to Ms.

Tolman one at a time, but sometimes several invoices at a time on occasions when Ms. Tolman attended at the Plaintiff's offices with a cheque to pay for scrap metal purchased;

- Ms. de Wet confirmed that she also e-mailed every invoice to Ms. Tolman as soon as it was issued. It was common cause between the parties before me that the invoices complied with the requirements of the Value-Added Tax Act;

- It is not disputed that each and every one of the invoices listed in "Y3" had been sent by e-mail to Ms. Tolman and had been received by her;

- Ms. Tolman also admitted that at the very latest she received all the invoices by September 2011.

- It is fair to say that, after all said and done, it was common cause that the Plaintiff is entitled to payment of the amount it alleges is due and payable by the Defendant, provided only that the Plaintiff should prove that valid invoices were issued in terms of the contract.

[11] I now turn to the "defence" that nothing is payable because the invoices issued and received by Ms. Tolman were not prepared along the lines

prescribed by the contract:

- In paragraph 6 of Exhibit "Z", a letter written by the Defendant's attorney to his counterparts on 1 June 2015 when efforts were made to curtail the outstanding issues, the Defendant states that the Plaintiff must prove by way of evidence that invoices were issued by the Plaintiff as prescribed in paragraph 8 and paragraph 5.4 of the Particulars of Claim, read with clause 13.1 of "POC1" (the Service Supply Agreement) which is annexed to the Plaintiff's Particulars of Claim;

- The paragraphs in the Particulars of Claim aforementioned read as follows:

> *"5.4 MK Metals would pay the purchase price to Xstrata within thirty days of issue of a tax invoice by Xstrata (Schedule 5, clause 3.4 of the Supply Agreement)";* and
>
> *"8. Xstrata Coal duly issued invoices in respect of the scrap metal sold and has at all times complied with its obligations in terms of the agreement."*

- Clause 3.4 of Schedule 5 of the agreement, "POC1", reads as follows:

"3.4 The Supplier (this is the Defendant) *must pay the Principal Supplier* (this is the Plaintiff) *the valid tax invoice within thirty days after date of issue."*

- It is useful to quote the contents of the whole of clause 3 of Schedule 5 of the Supply Agreement which, significantly, goes under the heading *"Payment Terms"*:

"3. ***Payment terms***

3.1 The Supplier (this is the Defendant) *must submit all supporting documents* (weigh bridge slips) *to the Principal Representative in the format as determined by the Principal at the end of each month;*

3.2 The Principal Representative shall use such documents to prepare a claim against the Supply as executed by the Supplier and make changes where necessary. Upon approval, the Principal Representative shall advise its Accounts Payable to issue a Valid Tax Invoice to the Supplier;

3.3 The Principal Representative will submit a Valid Tax Invoice to the Supplier on or before the last day of the month in which the Services Supply was executed;

3.4 (Already quoted)

3.5 If no payment is received by the Principal from the Supplier, than (sic) *the amount due will be deducted from the Supplier's Bank guarantee."*

- Clause 13.1 of the agreement "POC1" forms part of clause 13 which is headed *"Notices"* and 13.1 reads as follows:

"13.1 ***Form***

Unless expressly stated otherwise in this Agreement, all notices (including but not limited to certificates, consents, approvals, waivers and other communications), in connection with this Agreement, must be in writing, signed by the sender (if an individual) or an Authorised Officer of the sender and

marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way notified."

- Clause 13.2 provides that notices must be left at the address set out or referred to in the Details, sent by prepaid or ordinary post to that address, sent by fax to a fax number stipulated in the Details or given in any other way permitted by law;

- In columns going under the heading *"Details"* the Principal's Representative is named as one Mark Theron and his private bag address, telephone number, fax number and e-mail address are listed underneath his name.

  The *"Supplier's Representative"* is Ms. Lorraine Tolman and her residential address, telephone number, fax number and e-mail address are listed;

- Mr. Maritz argued with some force that, on a general reading of the contract, there is a clear distinction between submission of a tax invoice for payment by the Supplier and the giving of any other "Notice" in the spirit of clause 13.1.

It was argued, correctly in my view, that the submission of tax invoices for payment is provided for separately in clause 3 of Schedule 5 (as quoted) which is self-standing and not subject to the provisions of clause 13.3 dealing with *"Notices"*. The following considerations apply:

- Invoices are not listed as one of the examples of *"Notices"* mentioned in clause 13.1 and cannot reasonably be classified as one of the *"Other communications"* not specified;

- There is no provision in clause 3 of schedule 5 that invoices must be signed and Mr. Pearson, an experienced and credible witness in this particular field, testified that he had never come across a practice in his career whereby invoices had to be signed;

- Clause 3 of Schedule 5 does not require that the invoice must be *"marked for the attention of the person identified in the Details"* as is the case with clause 13.1;

- There is no stipulation in clause 3 of Schedule 5 as to the method of *"delivery"* (clause 13.2 of "POC2") which has to be followed;

- ❖ If it was the intention of the contracting parties to include the method of delivering invoices within the ambit of clause 13.1, they would have stipulated it accordingly, and the detailed formulation regulating the rendering of invoices in clause 3 of Schedule 5 would have been superfluous;

- I find myself in respectful agreement with the argument advanced by Mr. Maritz.

- In any event, even if I am wrong in this conclusion, and it can be argued that the method of submitting tax invoices is governed by the provisions of clause 13.1, the following considerations apply:

  - ➢ It is common cause that each and every invoice, identical to the original document, reached Ms. Tolman by e-mail;

  - ➢ This already happened by September 2011, at the latest, more than eighteen months before this action was instituted in April 2013;

  - ➢ Clause 3 of Schedule 5 does not specify that the invoice must be *"marked for the attention of the person identified in the*

Details" and Ms. de Wet gave clear and unequivocal evidence that she was duly authorised to issue invoices and clause 13.1 refers to *"an Authorised Officer"* and not the *"Principal Representative"* which is the designation given in the contract to Mark Theron;

- As mentioned, Ms. Tolman never complained, over a number of years, that the invoices she received did not comply with the provisions of the contract. Indeed, as mentioned, she made substantial payments against the invoices and, on occasion, even arranged for extended payment terms when she was financially, according to her, unable to make prompt payment. As indicated, this *"defence"* only emerged when the Plea was drawn;

- At the very least, I am of the view that the manner in which these invoices were sent and brought to the attention of Ms. Tolman at least substantially complies without the requirements of clause 13.1 or clause 3 of Schedule 5. Through her conduct and response to the invoices, Ms. Tolman acknowledged such compliance and, in the process, arguably waived any reliance on a *"defence"* such as the one appearing in her Plea. Indeed, the *"defence"* is not

specifically pleaded. With regard to the allegations in 5.4 of the Particulars of Claim (quoted) it is simply denied that 5.4 is a material term *"recorded on the agreement marked "POC1""* and, with regard to the allegations in paragraph 8 of the Particulars of Claim (quoted) these are simply met with a bare denial. In fact, the only basis on which it was pleaded that the claim is premature stems from an allegation that the Plaintiff failed to comply with the provisions of the National Credit Act. These provisions are not applicable and this further *"defence"* was not proceeded with;

- Moreover, in one of her counterclaims based on the Defendant's stance that the contract provides for her to also render invoices to the Plaintiff in respect of scrap metal removed, it is common cause that the invoices which she rendered were not signed and delivered in compliance with the requirements of clause 13.1 or, for that matter, clause 3 of Schedule 5. As Mr. Maritz correctly argued, the Defendant is not entitled to *"blow hot and cold"* or *"approbate and reprobate"* at the same time.

[12] In all the circumstances, I have come to the conclusion, and I find, that there is no factual or legal basis to non-suit the Plaintiff on the strength

[13] of the *"defence"* that the invoices were not in compliance with the provisions of the contract. Where this was the only basis upon which the Defendant ultimately sought to avoid having to pay the claim, and where it turned out to be common cause that the amounts claimed are properly calculated and payable, barring the *"defence"*, it follows that the claim ought to be upheld.

[14] As to interest, it was pointed out to me on behalf of the Plaintiff that although the amount of each invoice became payable thirty days after the issue of the invoice, the Plaintiff claims interest only from 20 December 2012, based on the letter of demand. This date, as pointed out, is more than a year after the last invoice was received by Ms. Tolman on her own admission.

[15] Consequently, I will provide, at the end of this judgment, for judgment to be granted in favour of the Plaintiff in the amount of R465,526.85 plus interest at the (then prevailing) *mora* rate of 15,5% *per annum*, calculated from 20 December 2012 to date of payment. The costs should follow the result.

[16] I turn to the counterclaims.

I will first deal with counterclaims 1 and 3, which are claims for alleged damages sustained as a result of alleged breaches of the agreements between the parties by the Plaintiff.

In the final instance I will deal with counterclaim 2, which is a claim for payment of monies allegedly due by the Plaintiff to the Defendant for the cutting up and removal of scrap metal, which monies, according to the Defendant, are claimable and payable in terms of the contract between the parties.

COUNTERCLAIMS 1 AND 3:

Introduction:

[17] When dealing with the Plaintiff's claim against the Defendant earlier in this judgment, I already made reference to the contract between the parties, attached to the Particulars of Claim as "POC1".

"POC1" was entered into at Witbank on 2 June 2008 and would endure for the term of twelve months.

When "POC1" was entered into, the Plaintiff was represented by one Mark Theron and the Defendant close corporation by its managing member, already referred to in the judgment dealing with the Plaintiff's claim, Ms. Thembelihle Lorraine Tolman ("Ms. Tolman").

[18] Broadly speaking, "POC1" provided that the Defendant would be entitled to

remove scrap metal from some of the many collieries of the Plaintiff in the Greater Witbank area. The Defendant would be entitled to sell this scrap metal to a recognised metal smelter at a profit and would pay the Plaintiff at a discounted purchase price upon receipt of invoices rendered by the Plaintiff following the gathering of the scrap metal and weighing thereof at the Plaintiff's weighbridges. The Defendant would also place waste bins at designated points where the scrap metal would be deposited by the Plaintiff's officials before removal thereof by the Defendant.

[19] "POC1", also described as a *"Service Supply Agreement"* or a *"Supply Agreement"* is headed *"Service Supply Agreement for the transportation and disposal of scrap metal for Tweefontein Complex"*.

[20] "POC1" provides that the scrap metal would be removed from the Plaintiff's Waterpan, Boschmans and Witcons Collieries situated on the farms Waterpan, Tweefontein and Boschmansfontein in the Greater Witbank / Ogies areas.

[21] The aim was to assist the Defendant to sustain a profitable business. The exercise was also part of the Plaintiff's intention to uplift previously disadvantaged communities residing in the area of the Plaintiff's coal mining district. The members of the Defendant close corporation hail from a previously disadvantaged community in the Ogies area.

[22] On the 28th of June 2010, evidently after the expiry of the first twelve month term, the parties entered into a written *"Deed of Amendment"* attached to the Particulars of Claim as "POC2".

[23] In terms of "POC2", the contract between the parties would endure for a term of thirty six months calculated from the date of signature of "POC1", 2 June 2008, to 1 June 2011.

[24] The purpose of "POC2" was to extend the operational activities of the Defendant, to the benefit of the Defendant, in the sense that the Defendant would now also be entitled to remove scrap copper cable and not only scrap metal as stipulated in "POC1".

In addition, the number of collieries from which the scrap metal, now including scrap copper cables, could be removed was increased from the initial three collieries mentioned in "POC1" to a total of twelve collieries (including the initial three), which would include the Phoenix colliery, forming the subject of the third counterclaim. The Waterpan colliery forms the subject of the first counterclaim.

[25] The dispute between the parties arose when, during 2010 and 2011, the Plaintiff engaged the services of a specialist contractor, Hendrina Metals, to demolish the Waterpan and Phoenix collieries and, in the process, also to

remove the articles, which inevitably included scrap metal, comprising the remnants of the demolished two collieries.

[26] The Defendant adopted the stance that it was *"tacitly agreed"* between the parties, when entering into "POC1" and "POC2" that the Defendant would be *"exclusively entitled"* to conduct the scrap removal and disposal from Waterpan and Phoenix collieries, even if the scrap metal was generated as a result of the demolition operations.

[27] On 11 April 2011, the Defendant, through Ms. Tolman, wrote a letter to the Plaintiff's general manager at the Tweefontein Division, claiming that the Defendant had the sole right to purchase, remove and dispose of scrap metal from the Tweefontein Complex. In the letter, the complaint was aimed at the contract awarded to Hendrina Metals to demolish the plants at Phoenix and Waterpan.

[28] The next day, 12 April 2011, the Plaintiff's General Manager: Finance, responded to the Defendant's letter as follows:

"Regarding your concerns we wish to point out the following:

1. *The demolition of Waterpan does not fall within the scope of work of the existing agreement between Xstrata and MK*

Metals. In this regard, please note that the Xstrata Waterpan Project consists of high risk activities and as such is handled as a separate contract being part of closure costs. The project consisting of demolition activities was awarded following a separate Expression of Interest (EOI) process based upon accepted procurement policies and procedures. The full requirements relating to plant demolition, including removal of scrap metals, are handled within that project, taking into account Xstrata's legal obligation to comply with the provisions of the Mine Health and Safety Act and other relevant legislation, also taking into account risks. Without going into certain detail, we confirm that the high risk of the demolition project as a whole requires specialist equipment and other measures to mitigate the hazards; with safety being of utmost priority in the project. We do not agree with your statement that MK Metals was awarded the sole right to remove all scrap from Xstrata sites and also taking into account the above, we place on record that we do not regard the EOI award of the separate project as breach of agreement.

2. *Xstrata has done its utmost, prior to and during the term of the agreement to assist MK Metals in developing a sustainable business. In this regard, please also specifically refer to the*

amendment of the initial agreement, wherein the term was extended by a further two years, further sites were included to the scope of work and the removal of copper cable was also included as part of the scope of work. The aforementioned was done with the view to assist MK Metals as a business in reaching sustainability. At the termination date of the agreement, being 1 June 2011, this agreement would have run for a period of thirty six months, during which time numerous discussions and meetings took place at site regarding the expectations, performance levels and overall management of the agreement. MK Metals also has a duty to take such steps to ensure the viability of the business in the long term.

3. *I strongly disagree that your letter of the 5th of September 2010 was not acknowledged. Several meetings were held thereafter at site with the view to discussing and addressing the issues. Xstrata's serious concerns regarding late payments by MK Metals were also discussed once again and your remedial action was requested .....*

We are, however, concerned that despite several meetings, discussions and requests by our site management the issue of late payments has not been addressed. In this regard please

note that there are outstanding payments from MK Metals in the amount of R360,000.00, of which an amount of R205,000.00 is now being outstanding for more than 120 days ...

Xstrata remains committed to sustainable development as is demonstrated with the assistance provided to MK Metals over the term of the agreement and as set out in the paragraphs above. In this regard, also note that the commercial agreement between Xstrata and MK Metals requires both parties to fulfil its obligations and we accordingly look forward to receiving payment of the outstanding amounts.

We would like to meet to discuss the various issues raised and request that you please provide three alternative dates that would suit you to enable us to arrange the meeting. ..."

[29] It appears that the Defendant did not take kindly to the attitude adopted by the Plaintiff, and, in August 2011, the Defendant launched an urgent application for final interdictory relief in this Court for an order:

"*1.2 Directing Respondent* (this is obviously the present Plaintiff) *to comply and/or abide by the terms and conditions contained*

in the written agreement concluded by and between Applicant and Respondents (sic) *in relation to the service supply for transportation and disposal of scrap metal salvaged from Respondent's operations at Tweefontein Complex concluded between Applicant and Respondent;*

1.3 Preventing Respondent from authorising the disposal of the salvaged scrap metal at Tweefontein Complex by any other party other than the Applicant."

[30] Attached to the Founding Affidavit to this urgent application was another letter from the Plaintiff, dated 17 June 2011, written by the general manager of the Tweefontein Complex in which the same sentiments were expressed as those in the letter of 12 April 2011, to which I have referred:

"Taking the above into account as well as that the commercial contract does not provide a sole right to MK Metals to remove scrap from the Xstrata sites, we record that Xstrata may also approach other suppliers in this regard as may be required in the circumstances. The quantities reflected in the contract are further recorded as estimates, and not fixed.

Please further note that your company is non-compliant to our

Contracted Pack requirements which comprise the Xstrata Coal Health, Safety, Environmental and Community (HSEC) Policies and Procedures. As discussed with our HSEC manager this morning, this needs to be attended to as a matter of priority as MK Metals will not be allowed on site before full compliance. Xstrata Coal is committed to the highest standard of HSEC performance as is also required by relevant legislation."

[31] The same case was made out in the Opposing Affidavit.

[32] The application was dismissed and, significantly, the Learned Judge, in his judgment, made, *inter alia*, the following remarks:

"What the facts of the matter disclose is that the contract between the parties contemplated the disposal by the Applicant of metals placed in the bins I have described by the collieries during the course of the operations as such. The Tweefontein Complex referred to in the papers is to be dismantled and what the Applicant seeks is access to the dismantled scrap metal generated from the Tweefontein Complex. This is not what the parties envisaged in their agreement as amended."

This is not an interpretation of the contract which I am at liberty to

ignore, unless I consider it to be clearly wrong, which I don't, for reasons which will appear later.

[33] It is also convenient to mention that in terms of "POC1" the Plaintiff is entitled, in its sole discretion, to terminate the agreement on 28 days notice.

Clause 10.5 of "POC1" provides:

"***Termination for convenience***

(a) Notwithstanding any other provision of this Agreement:

(i) the Principal may at its sole discretion terminate this Agreement by giving twenty eight days' written notice to the Supplier; and

(ii) the Supplier must:

(A) cease the execution of the supply within the times specified in the written notice;

(B) ensure that the Site is left in the same condition and the Supply is properly secured; and

(C) hand over to the Principal all Documentation."

Although there is provision for the Defendant (Supplier) to claim monies which may still be due at that point in terms of the agreement, the Defendant is not entitled, in terms of the provisions of clause 10.5(f) "POC1" *"to any other compensation, including any consequential costs, losses or damages".*

[34] In this case, the need for a termination did not come into play, because, at least in the case of the demolition of the Waterpan Colliery, it took place, and the scrap metal was generated, only after the contract came to an end on 1 June 2011.

[35] On the same topic, and by way of illustration, another example can perhaps be mentioned of the spirit in which "POC1" was crafted and entered into, with particular reference to the wide discretion and powers awarded to the Plaintiff: In terms of clause 5.1, the Plaintiff may *"at any time direct the Supplier to change the Supply* (i.e. the nature of the goods and/or services rendered in terms of the Agreement) *if that change is required by the Principal. That change may involve increases in or additions to, reductions in or omissions from, or changes in the character or the quality of the previous Supply. If the change requires the omission of work, the Principal may, if it so wishes, have the omitted work carried out by itself or others as it*

sees fit". [Emphasis added]

It is arguable, that if the Defendant would have raised an argument during the earlier stages of the term of the agreement, to the effect that it was entitled to the sole right to remove scrap metal, also such scrap metal generated by demolition work, the Plaintiff may have successfully invoked the provisions of clause 5.1(a). Nevertheless, and at the risk of travelling into unnecessary speculation, it can simply be observed that such action was not called for because the dispute raised by the Defendant only manifested itself after the contractual relationship had come to an end.

[36] What is, however, clear, undisputed and common cause between the parties, is that "POC1" did not contain any provisions to the effect that the Defendant had the sole right or was *"exclusively entitled"* as it was pleaded, to remove the scrap metal generated in these demolitions. This, no doubt, is the reason for the Defendant's decision to plead that the parties *"tacitly agreed"* to this effect.

[37] Against this background, I turn, for illustrative purposes, to the text of counterclaims 1 and 3 as pleaded:

The text of counterclaim 1 and 3 as pleaded:

[38] **Counterclaim 1**, as amended, following Rule 30-notices dispatched by the Plaintiff, and without the Defendant really removing the cause of complaint raised in those notices, reads as follows:

"4.

Claim 1:

In terms of Annexure "POC1" Schedule 7 as well as "POC2" to the Particulars of Claim, the parties agreed that Defendant would be entitled to conduct waste removal at Waterpan Colliery. It was tacitly agreed between the parties, when entering into "POC1" and "POC2" to the Particulars of Claim, that the Defendant would be exclusively entitled to conduct scrap removal and disposal from Waterpan Colliery.

5.

During or about April 2011, the Waterpan Colliery was being demolished. Waste removal of the scrap steel and copper cables from the demolition site was, in terms of the agreement, to have been removed by the Defendant.

6.

Contrary to the agreement between the parties, the Plaintiff

contracted with Hendrina Metals, a competitor of the Defendant, to carry out the waste removal. In doing so, Plaintiff breached the contract it had with Defendant. Defendant at all material times tendered to carry out it's obligation in terms of the contract.

7.

7.1 *The reasonable estimate of scrap steel removed from Waterpan Colliery is 1,000 tons. The reasonable market value of this scrap steel is R3,50 per kilogram. In the circumstances the reasonable market value that Defendant would have acquired had it sold the scrap steel is the sum of R3 174 500,00.* (Counsel for the Defendant noted in Heads of Argument that this figure is incorrect and should simply read R3 500 000,00.)

7.2 *The reasonable estimate of the copper cable removed from Waterpan Colliery is 300 tons. The reasonable market value of the copper cable per tonne is R65 738,00. In the circumstances, the reasonable market value that the Defendant would have acquired had it sold the copper cable is the sum of R19 721 400,00.*

7.3 The Plaintiff is liable for the loss suffered by the Defendant as a result of it not being permitted to remove the said scrap metal and copper cables. The sum of the aforesaid amounts is R22 895 900,00 which sum represents Defendant's damages.

7.4 These damages were within the contemplation of the parties at the time of conclusion of the contract.

8.

Wherefore Defendant prays for judgment against the Plaintiff as follows:

8.1 Payment of the sum of R22 895 900,00 with interest thereon at the rate of 15,5% per annum from date of judgment to date of final payment;

8.2 Costs of suit;

8.3 Further and/or alternative relief."

[39] **Counterclaim 3** reads as follows:

"13.

Claim 3:

In terms of Annexure "POC2" of the Particulars of Claim, the parties agreed that defendant would be entitled to conduct waste removal at the Phoenix Colliery . It was tacitly agreed between the parties, when entering into "POC1" and "POC2" to the Particulars of Claim, that the Defendant would be exclusively entitled to conduct waste removal and disposal from Phoenix Colliery.

14.

During early 2011, certain waste was required to be removed from Phoenix Colliery. Notwithstanding Plaintiff's obligation in terms of the contract with Defendant, Plaintiff gave the work to Hendrina Metals. Waste removal of the scrap steel and copper cables from the demolition site was, in terms of the agreement, to have been removed by the Defendant.

15.

In doing so, Plaintiff breached the contract. At all material times, the Defendant tendered its services to carry out the said waste removal work.

16.

300 tons of copper cable were removed from Phoenix Colliery. The Defendant was entitled to remove the copper cables and to acquire same for resale. The reasonable market value of the copper cable was R65 738,00 per ton . In the circumstances, the Defendant would have acquired the sum of R19 721 400,00 from selling the said scrap. The said sum constitutes Defendant's damages arising from Plaintiff giving the work mentioned herein to a third party. These damages were within the contemplation of the parties at the time of conclusion of the contract.

17.

Wherefore Defendant prays for judgment against the Plaintiff as follows:

8.1(sic) *Payment of the sum of R19 721 400,00 with interest thereon at the rate of 15,5% per annum from date of judgment to date of final payment;*

8.2 Costs of suit;

8.3 Further and/or alternative relief."

[40] In the Plea to these counterclaims, it is admitted that "POC1" was entered into

between the parties, that Waterpan Colliery was being demolished during or about April 2011 and that the Plaintiff appointed Hendrina Scrap Metals to carry out the demolition of Waterpan Colliery.

As to claim 3, it is admitted that Phoenix was added to the list of collieries from which scrap copper cables could be removed. Portions of the Plea in respect of claim 1 were also incorporated in the Plea in respect of claim 3

The allegations to the effect that the parties *"tacitly agreed"* that the Defendant would be *"exclusively entitled"* to remove the particular consignments of scrap metal were denied.

Denials in respect of some of the allegations were also based on particular extracts from "POC1", including Schedule 2, dealing with the *"scope of work"*.

[41] No replication was filed by the Defendant as Plaintiff in reconvention.

[42] There was a request for particulars for trial and an answer thereto.

[43] In my view it is noteworthy, in the circumstances of this particular case, that although the Defendant already alleged in April 2011 that it was entitled to exclusively remove the scrap metal, it never instituted an action for such

alleged damages flowing from the alleged breach by the Plaintiff until the counterclaims came to light in 2013, two years later, after the action was instituted.

BRIEF REMARKS ABOUT THE MERITS OF THESE COUNTERCLAIMS AND DEFENCES OFFERED BY THE PLAINTIFF, AS DEFENDANT IN RECONVENTION:

[44] I turn, firstly, to the question whether the Defendant, as Plaintiff in reconvention, succeeded in proving the existence of a tacit agreement to the effect that the Defendant would be *"exclusively entitled"* to remove, and dispose of, scrap metal from the Waterpan and Phoenix Collieries, generated by the demolition:

- The Defendant, as Plaintiff in reconvention, bears the onus to prove the existence of such a *"tacit agreement"* or a tacit term in the agreement entitling the Defendant to exclusively conduct the scrap metal removal, and that the alleged breach, which also has to be proved, entitles the Defendant to recover damages flowing from such breach;

- As mentioned, it is common cause that there is no specific provision in the agreement, "POC1", or "POC2" for that matter, to the effect

that the Defendant enjoys such exclusive right;

- I have mentioned examples from the wording of the agreement in terms of which the Plaintiff is afforded virtually exclusive powers, in its own discretion, to terminate the agreement or to reduce or remove portions of the *"Supply"* without incurring liability for consequential damages;

- The Plaintiff, from the outset, explained in some detail that there was no exclusive right, such as the one contended for by the Defendant, included in the contract. I refer to extracts from the letters of April and June 2011;

- Plaintiff advanced the same argument when successfully opposing the abortive urgent application in August 2011, which also led to the Learned Judge interpreting the contract in the way that he did, namely that the Defendant had no exclusive right of access to the dismantled scrap metal generated from the Tweefontein Complex;

- The existence of clear and unequivocal *"non-variation clauses"* in both "POC1" and "POC2" militates, in my view, against a conclusion that there was a tacit term or tacit agreement providing

for exclusivity such as the one which the Defendant contends for and has to prove:

- Clause 1.5 of "POC1" stipulates:

> *"This Agreement constitutes the entire agreement of the parties about each subject matter and supersedes all previous agreements, understandings and negotiations on this subject matter".*

- Clause 1.7(b) stipulated that a provision of a right created under this Agreement may not be:

> *"(i) waived except in writing signed by the party granting the waiver; or*
>
> *(ii) varied except in writing signed by the parties.";*

- Clause 3.1 of "POC2" provides:

> *"This Deed of Amendment and the Supply Agreement constitutes the sole record of the agreement between the parties in relation to the subject matter hereof. Neither party shall be bound by any express or implied*

term, representation, warranty, promise or the like not recorded herein or in those agreements. This Deed of Amendment supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the parties in respect of the subject matter hereof." [Emphasis added]

❖ Clause 3.3 of "POC2" stipulates:

"... no addition to, variation, novation or agreed cancellation of any provision of this Deed of Amendment shall be binding upon the parties unless reduced to writing and signed by or on behalf of the parties.";

- I turn to some guidance from the authorities on the question of deciding whether or not to import a tacit term into a contract. In the process, I take the liberty to adopt some of the submissions contained in the very comprehensive Heads of Argument presented by counsel for the Plaintiff:

  ➢ The tacit term upon which the Defendant relies is that *"the Defendant would be exclusively entitled to conduct scrap*

removal and disposal" from the colliery;

- The tacit term, applied to the facts, would have the effect that the Defendant had the exclusive right not only to scrap metal which became available in the course of normal, ongoing mining operations, but also to scrap metal which may become available after closure of the colliery and demolition of the Plant in the process of mine rehabilitation;

- The subject of importing a tacit term into a contract is comprehensively dealt with by the learned author in Christie's ***Law of Contract in South Africa.*** Where counsel referred to extracts from the 6th edition, I quote from the 7th edition:

  - On page 196, the following is said by the learned author:

    "A tacit term, or term implied from the facts, was described by Corbett AJA in ***Alfred McAlpine & Son (Pty) Ltd v. Transvaal Provincial Administration*** (the reference is 1974(3) SA 506 (A)) *as,*

> *'an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties'.*

Since they differ from terms implied by law in being based on the unexpressed or tacit common intention of the parties, such terms are better described as tacit terms, a description approved of by Corbett AJA in the ***Alfred McAlpine*** *case. This description has been generally adopted, but because 'implying a term' slips off the tongue more easily than 'importing a tacit term into the contract' the older terminology lingers on. As Corbett AJA observes: 'It is not a matter of great moment what terminology is adopted' provided a pleader does not allege that 'it was implicitly*

agreed', because of the ambiguity caused by the other meaning of 'implicit'.

In order to decide whether a tacit term is to be imported into the contract one must first examine the express terms of the contract. In the words of Rumpff JA in ***Pan American World Airways Inc v. SA Fire & Accident Insurance Co Ltd****: 'When dealing with a problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term'.*

The express terms may deliberately exclude the possibility of importing tacit terms of a particular type. Nor can a tacit term be imported on any question to which the parties have applied their minds and for which they have made express provision in the contract, so no tacit term can be imported in contradiction of an express term." [I am not repeating copious references in the footnotes to all the authorities.]

- In *Christie's at page 197* it is also pointed out that the aforesaid principle was well expressed by Van Winsen JA in ***SA Mutual Aid Society v. Cape Town Chamber of Commerce,*** *1962(1) SA 598 A at 615 D:*

> *"The term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See* ***Delmas Milling Co Ltd v. Du Plessis,*** *1955(3) SA 447 (A) at 454."*

- The learned author also points out, *at 198,* that in ***Union Government (Minister of Railways) v. Faux Ltd,*** Solomon JA said: